

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1726

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

MEREDITH CORPORATION, an Iowa Corporation,
Plaintiff-Appellant,

vs.

HARPER & ROW, PUBLISHERS, INC.; PAUL HENRY
MUSSEN; JOHN JANEWAY CONGER; and JEROME
KAGAN,

Defendants-Appellees,

BRIAN SUTTON-SMITH, an Individual, and
PRENTICE-HALL, INC., a Delaware Corporation,
Additional Defendants on Counterclaim-Appellants

APPELLEES' BRIEF



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MEREDITH CORPORATION,
an Iowa corporation,

Plaintiff-Appellant,

-against-

HARPER & ROW, PUBLISHERS, INC.,
PAUL HENRY MUSSEN, JOHN JANEWAY
CONGER, and JEROME KAGAN,

Defendants-Appellees,

Docket No.
74-1726

BRIAN SUTTON-SMITH, an individual,
and PRENTICE-HALL, INC., a Delaware
corporation,

Additional Defendants on
Counterclaim-Appellants.

-----X
APPELLEES' BRIEF

Preliminary Statement

This is an appeal from a preliminary injunction,
entered on May 24, 1974 in the Southern District of New
York by the Honorable Richard Owen, enjoining the sale

and distribution of the textbook Child Psychology (the "Meredith book"), which named additional defendant-appellant Brian Sutton-Smith ("Sutton-Smith") as its author. The Meredith Book was originally published by plaintiff-appellant Meredith Corporation ("Meredith") and is now published by additional defendant-appellant Prentice-Hall, Inc. ("Prentice-Hall").

Judge Owen granted the preliminary injunction on the ground that the Meredith book infringed the copyright of the most widely used college textbook in the child development field, Child Development and Personality, third edition, (the "Mussen book" or "Mussen") written by defendants-appellees Paul Henry Mussen, John Janeway Conger and Jerome Kagan (the "Authors") and published by defendant-appellee Harper & Row, Publishers, Inc. ("Harper & Row"). Based upon documentary evidence and largely undisputed affidavits, the Court below concluded that "On the record before me there is not only a showing of a probability of success on the merits, but indeed clear and convincing proof of plagiarism, and the need for immediate relief being established, I grant the preliminary injunction" (JA 187a)*.

*References "JA" are to the Joint Appendix. By stipulation, the record in this Court also includes four copies each of

Prior Proceedings in This Court

Although Judge Owen unequivocally stated his belief that immediate injunctive relief was fully warranted, he stayed the preliminary injunction entered on May 24, 1974 until 5 P.M., May 28, 1974 to afford appellants an opportunity to apply to this Court for a further stay. On May 28, 1974 appellees filed an application with this Court during the motion calendar for a stay of the injunction, a delay of the scheduled June 10, 1974 trial in the District Court until determination of this appeal and an expedited appeal schedule. Because this Court did not yet have Judge Owen's opinion (which was filed the next day) and because appellees had not prepared answering papers since the moving papers had been served in the Courthouse just moments earlier, this Court continued the interim stay of injunction until the next regular motion day, June 4, 1974 in order to allow the Court

(1) a compilation comparing some 400 passages of the Mussen book with similar passages found in the Meredith book, hereinafter cited as the "Compilation of Parallel Passages" and (2) a compilation comparing the outlines of five chapters of Mussen prepared by Meredith with five chapter outlines furnished to Meredith's freelance writers, hereinafter cited as the "Compilation of Chapter Outlines", and (3) defendants' deposition Exhibits 89 and 90 that were identified by Sutton-Smith, hereinafter cited as "Defs. Ex. 89" and "Defs. Ex. 90," respectively.

to receive and consider Judge Owen's full opinion and appellee's answering papers.

On June 4, 1974, after oral argument, this Court, from the bench, unanimously denied the appellants' motion for a stay of the injunction and a stay of the trial and granted appellants' request for an expedited appeal.

The Questions Presented

1. Did the District Court abuse its discretion in concluding that the appellees had prima facie proven copy-right infringement when the unchallenged and undisputed evidence established:

(a) that some 400 passages of the Meredith book were abstracted from Mussen;

(b) that inadvertent mistakes in Mussen may also be found in the Meredith book;

(c) that outlines for five chapters for the Meredith book incorporated word for word well over half of the outlines of Mussen chapters prepared by Meredith;

(d) that Meredith consciously determined to use and did, in fact, use Mussen as a content model for the Meredith book in terms of topics to be included and the weighting and sequence of those topics;

(e) that the "author" of the Meredith book repeatedly directed Meredith to include material from Mussen in "his" book;

(f) that the "author" neither prepared nor reviewed the chapter outlines used by the untrained freelance writers in preparing the manuscripts for every chapter of the Meredith book;

(g) that the "author" of the Meredith book had absolutely no contact with the freelance writers who actually wrote the Meredith book;

(h) that the "author" claimed that he did not know how the freelance writers prepared the manuscripts which he reviewed although those manuscripts on their face contain numerous references to Mussen;

(i) that the "author" himself repeatedly concluded that portions of the manuscripts were indeed paraphrased from Mussen.

2. Where the study of child development is a diverse and rapidly-changing field of scholarship characterized by conflicting approaches, theories and philosophies, did the District Court abuse its discretion in finding the doctrine of fair use inapplicable where:

(a) the use involved was nothing more than obvious and extensive paraphrasing; and virtually the entire structure, organization, selection and weighting of topics of five chapters was appropriated;

(b) the Meredith book competes with Mussen for the identical market; and

(c) the use of the protected material was for the purpose of publishing a directly competitive book.

3. Were appellees' guilty of laches and did the District Court therefore abuse its discretion in entering a preliminary injunction on May 24, 1974 where:

(a) Meredith had removed the Meredith book from the market in October 1973 following Harper & Row's protest of infringement and Harper & Row and the Authors believed that the book was off the market at least until February, 1974 after the important December-January selling period for Spring classes;

(b) appellees had stated during a pre-trial conference with the Court below on March 15, 1974 their intention to move promptly for a preliminary injunction but agreed, at the Court's instance, not to do so because an early trial date of June 3, 1974 was fixed;

(c) all the direct evidence of deliberate, conscious copying and lack of scholarship was obtained during discovery in April and May, 1974;

(d) Prentice-Hall actively began to seek sales for the fall classes during May, 1974, considerably earlier than the traditional peak selling season of July-August which normally would have followed the trial; and,

(e) the June 3, 1974 trial date, subsequently adjourned to June 10, 1974, was seriously threatened by appellants' efforts in early May to embark upon a vast program of discovery involving at least several dozen depositions all over the United States and even one in Israel.

The Opinion Below

The extensive 18 page opinion of the Court below found that Mussen was and is one of the most widely used college textbooks in the United States with about thirty percent of a market in which no single textbook dominates the field (JA 160a; 187a).

The District Court found that, in 1971, Meredith decided to publish a child development textbook, and after a market research study had identified Mussen as the leading

text, Meredith selected Mussen as the content model "in terms of topics to be included, weighting of topics, and sequencing of the topics" (JA 54a; 68-69a; 188a). Sutton-Smith, the Court found, wrote in various memoranda to Meredith that in one section "you will follow (Mussen) fairly closely" and as to another chapter he advised "Mussen'(s) material is pretty adequate but could be condensed...." (JA 497a) and for another section he "Mussen, etc. have good coverage of facts, babbling, smiling, crying and sucking, tho put babbling in third chapter..." (JA 513a). The Court concluded that Sutton-Smith knew how the Meredith book was being prepared since he outlined three Mussen chapters with page references during his supervisory participation (JA 190a; 476a).

The Court further found that Meredith personnel outlined Mussen chapters and then rearranged these outlines, often in haec verba, for the use of freelance writers engaged to prepare first drafts of chapters for the Meredith book (JA 188a; Compilation of Chapter Outlines). The freelance writers who wrote the basic drafts of the Meredith Book, the Court found, were not professional psychologists, and indeed the principal

freelance writer, who prepared the manuscripts of several chapters while employed as a full-time speechwriter for Exxon Corporation, had never taken a single course in child development or psychology (JA 55a; 188a).

The District Court's opinion points out that Sutton-Smith did not write the first draft of any chapter of the Meredith book, had no knowledge of what was done in their preparation and had but a part-time commitment to the book extending over a period of some six months (JA 189-190a; 480a). For his limited participation, he was paid a 3% royalty rather than the standard royalty of 15% traditionally received by authors of college textbooks (JA 57a, 189a; 483a).

The Court concluded that perhaps one-third of the Meredith book is a "recognizable paraphrase" of Mussen and set forth in an Appendix "related passages from the two texts demonstrating the copying" (JA 191a) which the Court found were "typical" of the approximately 400 passages paraphrased from Mussen contained in the Compilation of parallel passages (JA 191a).

The Consideration of "Fair Use". The Court rejected the "fair use" doctrine for three reasons: (1) that the taking harmed the sales of the Mussen book; (2) that the copying was extensive and not insignificant; and (3) that the purpose of the "use" was to enable Meredith to secure the same market as the text which had been copied (JA 192a-195a).

The Defense of Laches. The Court found that following their discovery of the substantial similarity between the Meredith book and their book in the spring of 1973, the Authors first made a preliminary survey and, by September 1973, an exhaustive study of the similarities resulting in a lengthy compilation of 400 parallel passages placing portions of the two texts side by side which was then submitted to Meredith along with a formal notice of infringement. In October, 1973, Meredith withdrew its book from the market and, to Harper & Row's knowledge, it did not reappear until January, 1974 (JA 197a). Therefore, the Court found that certainly until January, 1974 there could be no valid claim of laches. Thereafter, the matter was in litigation and, at a pretrial conference on March 15, 1974, appellees informed the Court that they in-

tended to move for a preliminary injunction. However, appellees deferred to the Court's suggestion of an early trial, and a June 3 trial date was fixed, because they then believed that the trial would have been concluded and injunctive relief obtained prior to the July-August peak selling season for textbooks (JA 197a). The Court further found that during April and May the appellees obtained decisive documentary and testimonial evidence of intention to copy (JA 197a). Under these circumstances, the District Court rejected the laches defense.

The Need for Immediate Injunctive Relief. By May, it had become apparent that the peak selling season for college textbooks this year would be abnormally early because of a possible shortage of paper supplies. It had also become clear that Prentice-Hall was urging its customers to make purchases earlier than the usual peak season of July-August for that reason (JA 162a-163a; 197a). At the same time, the early trial date had been placed in serious jeopardy due to discovery problems. Thus, appellees were faced with the distinct possibility that the Mussen book would be unprotected during the most important selling season of the year (JA 163-5a; 198a). The District Court concluded that preliminary protection was therefore needed and warranted.

Statement of Facts

The conscious and extensive copying by Meredith of the organization, sequencing of topics, weighting and the language of the Mussen book is far, far beyond anything that can be found among the reported cases dealing with copying infringement of educational materials, an assertion we believe is fully supported by the documentary evidence and the virtually undisputed* facts before the Court below.

Meredith's Selection of Mussen as the Content "Model".

In May 1971, after initial market research, Meredith included "Mussen-Child Psychology" in its recommended list of ten titles for 1973 (JA 94a). Meredith's further market research confirmed that "Mussen leads in adoptions, and in number of users, and is therefore the model book" (JA 68a). Meredith also concluded that in its market research report that "Mussen, the leading book, serves as the content model (for Meredith's proposed book) in terms of topics to be included, weighting of the topics, and sequencing of the topics" (JA 68-69a). While

* Strangely, appellants assert that the Court below declined to permit live testimony from Sutton-Smith (App. Br. p.35). In fact, appellants, who argued the motion at great length and submitted voluminous affidavits, chose not to offer the testimony of Sutton-Smith. Rather, they simply stated that Sutton-Smith was in court and was willing to testify; they did not call him as a witness and did not request that he be heard.

other texts are mentioned briefly in the report, the "Weighting" section of that report deals almost exclusively with the contents of Mussen, suggesting only minor changes in coverage (JA 71-72a). Similarly, the sequencing section predominantly discussed the organization of Mussen and states that "Mussen's fourth chapter on learning and development should be placed in or directly after Chapter 1," and "Since Mussen is the leading book in the field, (there is) no reason to vary substantially from the categories he uses." It also suggested that "the [Meredith] text [should] follow Mussen in treating the years of middle childhood as one large age grouping" (JA 73-74a). In the next section of the report, entitled "Other Considerations in Content" the discussion again centers on Mussen, and only minor changes in emphasis are suggested. Appellants' suggestion that Mussen was not picked as the model for the Meredith text (App. Br. 8) is simply not so.

The Diversity of Child Development Texts.

Meredith's own market research report highlights the vast differences in child development texts. For example, another popular text, CRM, devotes 50% more text to the years

after twelve and Hurlock, another popular text, devotes over three times as much coverage to those years (JA 72a). The report notes that some texts take a chronological and others a topical approach to the material (JA 72a). In short, there are a variety of ways to approach the subject of child development, as Sutton-Smith unequivocally confirmed during his deposition:

"There is nothing logical -- it has certain precedents and convention, but there is nothing necessary about it. Different writers and different books divide up the organism in all sorts of ways."
(JA 315a)

Dr. Kagan's affidavit in support of the preliminary injunction motion details the vast differences among the existing child development texts, due in no small part to the multi-disciplinary nature of the field which "draws on data gathered in such diverse fields as sociology, anthropology, behaviorist genetics, pediatrics and some areas of home economics" (JA 173a). Another reason for the diversity of the field is the truly vast scope of research, the variety of theories of cognition and development and the ever-expanding developments in

research (JA 173-174a).

Appellants do not and cannot dispute this wide diversity and variety, but merely claim that the subject matter, i.e., human development, dictates a chronological approach, an assertion their own market research report disproves (JA 72-73a).

Having picked the text to be imitated, Meredith next sought out Sutton-Smith to lend his name as the "author". Actually, he was retained to "consult" on the "project" which would require him to devote "only a few hours a week" during a period of only from "four to six months," further enticing him with the assertion that in one year's time "you would be known as the sole author of the leading child psychology text on the market" (JA 480a).

Outlines of Mussen Chapters Were Copied Into the Chapter
Outlines for the Meredith Book.

As part of his contribution to Meredith's plan to copy the content and organization of Mussen, Sutton-Smith reviewed Chapter 4 of Mussen and provided notes for various

chapter outlines of the proposed Meredith book, replete with page references to Mussen (JA 491a; 492a; 496-498a; 500-502a; 512a; 515-516a). He specifically directed Meredith, in his supervisory role, to include Mussen material in "his" book in notes to Meredith stating "Mussen, etc. have good coverage of faces, babbling, smiling, crying and sucking. Tho put babbling in third chapter" (JA 513a); "my assumption is that you will follow MKC fairly closely..." (JA 515a); "Mussen, Kagan and Conger's material is pretty adequate but could be condensed except for cognition..." (JA 497a) and "readings below follow Mussen, Conger & Kagan with added emphasis by me." (JA 509a).

Meredith, under Sutton-Smith's guidance, then proceeded to systematically outline Mussen by incorporating the Mussen outlines into the outlines for the Meredith book. At least five Mussen chapters were outlined by Meredith and massive sections of the outlines of Mussen were then incorporated in haec verba into the Meredith outline. The accuracy of this statement can be readily verified from a cursory review of the Compilation of Chapter Outlines, which is part of the record,

comparing the Meredith outlines of Mussen with the outlines for the Meredith book. Appellants' assertion below that the outlines of Mussen were done by a Meredith editor for "her own personal use" is absurd, as is the suggestion that the diagonal lines appearing on the Mussen outlines are an indication they were not used (JA 99-100a).

The Meredith chapter outlines themselves, moreover, contain numerous specific and general directions to Mussen, such as "See MCK" followed by a page reference, together with references to other sources supporting the topic lifted from Mussen. In addition, Sutton-Smith himself repeatedly directed Meredith to use Mussen for the contents of the chapter outlines. Perhaps most significantly, Sutton-Smith did not prepare a single chapter outline himself and did not see or review the chapter outlines prepared by Meredith. As he colorfully put it to the Meredith editor, "Hell no, that's your job" (JA 266a).

Thus, the appellants' bald assertion that there are significant differences in organization and coverage between the two books simply has no basis in this record.

The Hiring of the Actual Authors.

With the chapter outlines prepared in this fashion, Meredith then advertised in the New York Times for freelance writers to write the text of each chapter for completion in a matter of weeks (JA 55a). None of the freelance writers were professional child psychologists; indeed, one writer, Lawrence Locke, who wrote several chapters, was a full-time speech writer for the Exxon Corporation who worked evenings and a few weekends on each chapter he prepared (JA 55a). Sutton-Smith not only did not supervise the freelance writers, he had no contact whatever with them (JA 266a).

The Preparation of Related Teaching Materials

Early in the "project," when manuscripts for only two chapters of the Meredith book had been prepared, Meredith engaged a writer to begin preparing a teacher's manual based on Mussen, knowing full well that their eventual book would have the same contents as Mussen. The Meredith letter states in part:

"A copy of Mussen, Conger and Kagan: Child Development and Personality [is enclosed]. This book will give you a better idea of what goes into succeeding chapters -- until you receive our manuscript." (JA 80a)

The Editing and Intentional Concealment of the Copying

The freelance writers' manuscripts were returned to Meredith for editing and were then forwarded to Sutton-Smith, who reviewed them, raised questions and added an original paragraph or two of his own (JA 522-529a; Defs. Exs. 89 and 90). On at least six occasions he discovered that Mussen had been paraphrased and made handwritten notes on the manuscript as follows:

"This page is paraphrase of Mussen Conger and Kagan" (JA 524a);

"This is again too close to MCK for comfort" (JA 465a; 527a);

"It's spot by spot paraphrasing" (JA 465a; 527a);

"Paraphrasing MCK p. 509" (JA 468; 527a);

"A bit close to MCK" (JA 468a; 528a);

"P. 510 same generalization, same example" (JA 468a; 529a);

On another occasion he wrote to Meredith that Chapter 10 had been paraphrased from Mussen and another text, Ginsberg and Oppen, though he did nothing to verify the accuracy of Meredith's explanation (JA 487a).

A fair measure of the level of his scholarly contribution to "his book," at least at this stage of the project, can be gained from his marginal notes on the manuscripts before Judge Owen. Furthermore, an examination of Defendants' Exhibits 89 and 90, which are copies of the manuscripts of Chapters 5 and 12, respectively, of the Meredith book discloses Sutton-Smith's remarkably sparse contribution to that book. Thus, he added sentences here and there (See Defs. Ex. 89, pages 4, 10, 19, 21, 26, 38, 43, 44, 45 and Defs. Ex. 90 pages 2, 14, 20, 30, 39), deleted two paragraphs from one chapter (Defs. Ex. 90, pages 24-25), added two paragraphs to one chapter (Defs. Ex. 89, pages 45a and 50) and four paragraphs to another (Defs. Ex. 90, pages 2, 20A, 34, 65), asked questions (Defs. Ex. 89, pages 13, 22, 34 and Defs. Ex. 90, pages 7, 29, 38, 44) and made some editorial changes and comments such as "p. 146 MCK," and "See MCK," "We need more of Burton White" (Defs. Ex. 89, pages 12, 15 and 45) and "should mix in more Ginsberg" and "He has done very little of this himself" (Defs. Ex. 90, pages 16 and 2). This summary fairly covers the entire contribution to two entire chapters of the Meredith book by the person who claims to be

its "author" on the basis of his own original scholarship. The hollowness of those claims are manifest.

Meredith's "Content Control" Review

Following Sutton-Smith's cursory review, the manuscripts were returned to Meredith for "content control" review. Meredith's content control reviewer was directed to "call attention to major omissions based on the model and the marketing objectives" and to "evaluate the organization, noting significant departure from the model, whether advantageous or not." The reviewer was specifically told that "The model and the marketing report are the arbiter combined with your own common sense." As noted, the "model" was Mussen and as a result the content control reviewer obviously carefully compared the Meredith book with Mussen to be sure that "in terms of topics to be included, weighting of topics and sequencing of topics" Mussen had been faithfully copied. It is hardly surprising that the review notes are replete with references to Mussen.

Moreover, the content control review served a second purpose revealed by the documents before the District Court: namely, to make sure that the copying had

been concealed. Thus, one reviewer noticed that the Meredith manuscript contained a discussion of a particular phenomenon including a reference to the Ibo tribe of Nigeria which was almost identical to Mussen's discussion. She noted: "Can we find another group besides Ibo as this is a dead giveaway" (JA 90a). Instead of finding another tribe, however, Meredith merely inserted an erroneous citation to another research study for the material copied from Mussen.

The Resulting Book Copied Mussen

The book which resulted from this deliberate plan to copy Mussen contained at least 400 passages similar to Mussen, internally organized according to an outline taken directly from Mussen. The proof of these assertions is set forth clearly in appellees' Compilation of Parallel Passages and Compilation of Chapter Outlines. The Chapter Outline Compilation demonstrates beyond question the taking of the outline of Mussen by the Meredith book. The examples cited by the Court from the Compilation of Parallel Passages also demonstrates the truly massive copying of Mussen which occurred. One of the three examples, as noted above, was found by Sutton-Smith to have been paraphrased from Mussen (JA 524a).

The insertion of one sentence in another one of the parallels surely does not disprove the copying of that passage. Indeed, the record in this case is utterly devoid of any facts showing that any of the 400 passages had not been copied from Mussen. On the basis of the record before the District Court, the evidence of copying was both massive, overwhelming and free of genuine issues of fact.

Mussen Was Not Acknowledged As A Source For Any Material In The Meredith Book

Despite the use from the very beginning of Mussen as a content model, the copying of the outline and organization of chapter after chapter of Mussen through the joint efforts of Meredith and Sutton-Smith, and despite the paraphrasing of Mussen by untrained freelance writers and the discovery by everyone concerned of that copying, not one single citation to Mussen can be found among the hundreds of bibliographic references in the Meredith book.

Investigation and Action by Appellees

The Meredith book first came to the attention of the Authors in March and April 1973, prompting their

preparation of preliminary comparisons of similarities which were forwarded to Harper & Row. Harper & Row undertook a systematic comparison of the two books which required months of work and resulted in an earlier version of the Compilation of 400 Parallel Passages before this Court.

On September 27, 1973, this compilation of parallel passages was forwarded with a formal infringement notice to Meredith. In October 1973, sales of the Meredith book ceased and, to appellees' knowledge, did not resume until sometime in February 1974. On December 23, 1973 in the midst of what Harper & Row believed were settlement discussions, commenced in October 1973 when the Meredith book was withdrawn from the market, Meredith "raced" to the courthouse and instituted this action seeking a declaratory judgment of non-infringement, hence the unusual inversion of the parties.

Defendants immediately began depositions, but were unable to obtain any of the Meredith documents (which Meredith's counsel had promised in writing on October 6, 1973 would be "retained") until late March 1974 when Prentice-Hall discovered the documents. By the beginning

of April the documents had been copied and this astonishing record of conscious plagiarism began to come to light. Depositions of Sutton-Smith and the Meredith personnel involved were taken as quickly as possible in April and early May to complete the necessary foundation for proof for trial and for a motion for a preliminary injunction.

During early May it also became known that the appellant Prentice-Hall was soliciting sales of the Meredith book for the Fall season earlier than normal.

For these reasons, appellees promptly moved on May 13, 1974 for a preliminary injunction by order to show cause; the preliminary injunction was entered on May 24, 1974 and is now the subject of this appeal while a trial on the merits is actually being conducted in the District Court, a trial which in all likelihood will conclude before this appeal can be heard, much less decided.

ARGUMENT

A preliminary injunction in a copyright action will be disturbed on appeal only "when a clear abuse of discretion is shown" (Emphasis Added). Rice v. American Program Bureau, 446 F.2d 685, 688 (2d Cir. 1971); Joshua Meier Co. v. Albany Novelty Mfg. Co., 236 F.2d 144, 146 (2d Cir. 1956); Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966).

POINT I

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN FINDING INFRINGEMENT BY MEREDITH

As the Court below noted, appellees had to satisfy

"the two elements comprising a prima facie case of copyright infringement:

- (1) Ownership of the copyright and
- (2) Copying, which is normally established by proof of access and substantial similarity, McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F. Supp. 415 (S.D.N.Y. 1971)." (JA 187a)

Since access was conceded, the sole issue was one of copying. Unlike the ordinary infringement action, however, appellees offered truly massive direct evidence of extensive copying of Mussen, as well as overwhelming evidence of substantial similarity.

A. Direct Evidence of Copying.

The record fully supports the District Court's finding of "clear and convincing proof of plagiarism":

1. From its very inception, Mussen was intended to be the "model" on which the Meredith book was to be based. (See pp. 12-13 above).

2. Sutton-Smith was retained merely to "consult" on a "project" (JA 480a). Not only was his remuneration consistent with a truly meagre effort (a 3% royalty versus the traditional 15%), but also the time demanded of him by Meredith was a tiny fraction of the time devoted by the authors of authentic scholarly works* (See pp. 9 and 15 above).

* In this case, Dr. Mussen spent over 5000 hours on the first edition, 400 hours on the second, 2400 hours on the third and 1500 hours on the fourth edition. Dr. Conger estimates that he spent over 4000 hours on the first edition, 500 hours on the second and 2000 hours on the third. Dr. Kagan devoted 1500 hours to the second edition and 1200 hours to each of the third and fourth editions respectively (JA 178a).

3. Meredith outlined chapters of Mussen and the subsequent outline for the chapters of the Meredith book, in at least five instances, were nothing more than direct, virtually verbatim outlines of most of the corresponding Mussen chapters, complete with references to Mussen (JA 55a; Compilation of Chapter Outlines for chapters 2, 5, 6, 7 and 9). Significantly, Sutton Smith did not review the chapter outlines and never saw the outlines for "his book" (JA 266a). (See pp. 15 - 17 above).

4. Meredith was so certain that the contents of the two books would be the same that it hired a writer to prepare a workbook based on Mussen well before its manuscript had been written (JA 80a).

5. Freelance writers with no training in child psychology actually wrote the Meredith book. Sutton-Smith did not select these writers nor did he have any contact with them (JA 266a). The chapter outlines furnished to these writers continually direct them to "See Mussen" (JA 55a). (See pp. 18 - 21 above).

6. After the writers had completed their chapter manuscripts, a Meredith employee reviewed their work. The

reviewers were instructed to "call attention to major omissions based on the model...", to "evaluate the organization noting significant departures from the model..." and to "resist the temptation to impose your own view on the subject matter" (JA 56a). The reviewer while making sure that the book followed Mussen in content, topics and sequencing, also apparently scrutinized the manuscript for overly obvious evidence of copying. (See pp. 19 - 22 above).

7. Although the initial drafts of the Meredith book contained repeated references to "See Mussen," not a single reference to Mussen appears in the published version. Meredith chose to publish thousands of citations and references, but deleted the references to the text from which the material was actually obtained. This is the essence of plagiarism.

In short, rarely has an infringement case involved such overwhelming and pervasive direct evidence of copying as does the case at bar. Indeed, unlike the situation in Breffort v. I Had A Ball Co., 240 F. Supp. 1018 (S.D.N.Y. 1965) where the plaintiff sought earlier

drafts to prove direct copying of a play, the appellees in this case have already obtained these earlier materials and they are filled with proof of copying of Mussen (JA 55a-56a). In sum, the facts adduced clearly show a deliberate scheme to do nothing less than pirate Mussen and to pass off the resulting book as the original scholarly work of "Author" Brian Sutton-Smith.

B. Indirect Evidence of Copying:
Access and Substantial Similarity

Even in the absence of the overwhelming direct evidence of copying present in this action, the record fully supports the Court's alternative basis for finding infringement; to wit, substantial similarity.

1. Quantity of Similar Passages.

After reviewing the Compilation of Parallel Passages, the Court below concluded: "Perhaps one-third or more of the Meredith book is, in my opinion, a recognizable paraphrase of Mussen Third Edition" (JA 191a). Appellants challenge this finding on the basis of their own "line count," which they assert reveals that 11% of the lines are allegedly appropriated from Mussen. Such a

line count, of course, neglects the evaluation of the organization of materials, the topics selected and the weighting of topics -- indeed, the entire structure of the book which was lifted directly from Mussen. Furthermore, it should be emphasized that the compilation of similar passages does not purport to be all-inclusive, but simply exemplifies the more flagrant plagiarism by Meredith. The law is clear that paraphrasing is tantamount to copying. Eisenschiml v. Fawcett Publications, 246 F.2d 598 (7th Cir. 1957); Davis v. E. I. Dupont, 240 F. Supp. 612 (S.D.N.Y. 1965); Consolidated Music Pub. v. Hansen Publications, 339 F. Supp. 1161 (S.D.N.Y. 1972).

The law is also clear that although the quality of the similarity outweighs the quantity, quantity remains a significant factor. Yet courts have found substantial similarity where less than 15% of the respective works were taken College Entrance Book Co. v. Amsco Book Co., 119 F.2d 874 (2d Cir. 1941), and where even only a few percent of the material is taken Colonial Book Co. v. Amsco School Publications, 41 F. Supp. 156 (S.D.N.Y. 1941).

See also, Higgins v. Baker, 309 F. Supp. 635 (S.D.N.Y. 1969), where even only 0.8% of the plaintiff's work constituted prima facie evidence of copyright infringement. No case has found insubstantial similarity where, as here, appropriated portions approached a third the protected material. Here, for example, a clear majority of Chapter 5 of the Meredith Book was copied from Mussen (Compilation of 400 Passages, pp. 19-39) and well over half the outline and organization of five of the fifteen chapters were copied in haec verba from Mussen.

2. "Pattern"

The similarity between the books is established not merely by the vast quantity of paraphrasing, but also by the fact that the entire "pattern" of the book, its very conception, the selection of chapters, the sequencing of topics -- the fundamental approach to instruction in this unusually varied and ever-changing social science -- was totally adopted by Meredith.

Strong evidence of the pattern of copying is provided by the Compilation of Parallel Passages and, perhaps more clearly by the Compilation of Chapter Outlines. Those Compilations show without question that the basic format of the Meredith book was abstracted directly from Mussen. Finally, Meredith set out to use Mussen as a model and made sure that this had been done by having the resulting manuscripts reviewed to be sure that this had been accomplished.

It is, of course, well settled that allegedly infringing works need not be literally identical in order to be found substantially similar for purposes of copyright infringement. Nichols v. Universal Picture Corp., 45 F.2d 119, 121 (2d Cir. 1930); Nutt v. National Institute, Inc., 31 F.2d 236 (2d Cir. 1929); Consolidated Music Pub. v. Hansen Publications, supra,; Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 55-56 (2d Cir. 1936). See also

Addison-Wesley Publishing Co. v. Brown, 223 F.Supp. 219, 224, 225 (E.D.N.Y.1963). As Judge Learned Hand stated, in Nichols v. Universal Pictures Corp., supra:

"It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations." 45 F.2d at 121.

In Nutt v. National Institute, Inc., supra, where the court was confronted with similarly constructed lectures designed to improve memory, the Second Circuit held that:

"Copying is not confined to a literary repetition, but includes various modes in which the matter of any publication may be adopted, imitated or transferred with more or less colorable alteration." 31 F.2d at 238.

There the court emphasized that a reversal in order of presentation was merely a colorable variation which did not avoid infringement and that both lectures treated substantially the same ideas and topics, were addressed to the same audience, with the same general method of

treatment. All of those factors as well as the volume of parallel passages and direct evidence of copying are present in the case at bar.

In Consolidated Music Pub. v. Hansen Publications, supra, Judge Weinfeld held that, in addition to, and separate from, the infringement established by the series of parallel pages in a rhythm guitar instruction book, "the structure and organization of defendant's book is so close to the structure and organization of plaintiff's as to warrant, also on this ground, a finding of copying". 339 F. Supp. at 1165.

As Judge Learned Hand stated in Sheldon v. Metro-Goldwyn Pictures Corp., supra:

"We have often decided that a play may be pirated without using the dialogue. ... Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves. ... The play is the sequence of the confluents of all these means, bound together in an inseparable unity; it may often be most effectively pirated by leaving out the speech, for which a substitute can be found, which keeps the whole dramatic meaning." 81 F.2d at 55-56.

See also the discussion of the "pattern" test in Nimmer, Copyright (1973) ¶143.11, pp. 622-23.

The copyright is infringed where the "pattern" (i.e., the fundamental essence or structure) is copied, as in this case, even though the component details of the pattern, have been altered by the infringer. In Peter Pan Fabrics, Inc. v. Acadia Co., 173 F.Supp. 292, 300-01 (S.D.N.Y. 1959), aff'd sub nom. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960), Judge Herlands, in holding plaintiffs' design infringed by defendant's design, described how the pattern or "mosaic", i.e., the fundamental essence or structure, of the copyrighted work might be infringed even though the component details of the pattern or mosaic were varied and different:

"Graphic plagiarism is committed when the copyist preserves the structural and material characteristics of the original, notwithstanding deliberate and systematic variation of each subordinate detail." 173 F. Supp. at 300.

Thus, where Meredith has simply reorganized topics covered in Mussen chapters, its unlawful taking is not concealed, but in fact, confirmed. Such attempts to conceal have been held to merely emphasize the deliberateness of the copying. Consolidated Music v. Hansen Publications, supra. And, precisely such efforts to conceal

are documented in this record by the sensitivity to "dead giveaways" (JA 90a) and the alertness to "verbal similarities to the model" (JA 91a).

POINT II

THE COURT BELOW DID NOT ABUSE ITS
DISCRETION IN THE FINDING THAT THE
DOCTRINE OF FAIR USE WAS INAPPLICABLE.

After reviewing the origins and purpose of the
"fair use" doctrine, the Court below concluded:

"In determining whether the use here is
'fair', I conclude the following three
factors should be considered:

- (1) the competitive effect and function
of the usage;
- (2) the quantity of the material used;
and
- (3) the purpose of the selections made."

(JA 193a)

As to the first and third factors, the Court concluded
that there was no dispute that Mussen and Meredith com-
pete for sales in the identical market, that the continued
sale of Meredith would substantially injure the revenues
of Mussen, and that the purpose of the takings was to
enable Meredith to compete with Mussen, and hence not to
serve another useful purpose. In appellants' brief, these
conclusions have not been challenged.

With respect to the second factor -- the quantity used -- not only has substantial similarity been established as a matter of law (see Pt. I-B, supra), but there is no question that a large amount of the language of Mussen has been used without consent (a majority in the case of Chapter 5), and a substantial majority of the outlines of five chapters were taken from Mussen showing a truly massive taking of the pattern, structure and topics. The Compilation of Parallel Passages, we submit, conclusively demonstrates the enormous quantity of materials unfairly used.

In all the cases which have found that an unauthorized use was fair, none of them have dealt with appropriations of more than 10% of the copied materials, and indeed, usages of more than a few percent of the material will seldom be found to be fair. In Rosemont v. Random House, 366 F.2d 303 (2d Cir. 1966), upon which the appellants indicate principal reliance, the Court found that the Hughes biography copied only two direct quotations and one eight line paraphrase from three copyrighted magazine articles which in their entirety, would have filled 36 to 39 book sized pages. Since the allegedly infringing book consisted

of 304 pages and 116,000 words, the Court found the copied material was but an insubstantial part of the allegedly infringing book.

Indeed, the Rosemont case, far from providing comfort for Meredith and Sutton-Smith, strongly supports the position of Harper & Row and the Authors, by explicitly pointing out the limits of the "fair use" doctrine:

"The fair use privilege is based on the concept of reasonableness and extensive verbatim copying or paraphrasing of material set down by another cannot satisfy that standard." 366 F.2d at 310.*

Furthermore, in Rosemont the plaintiff was found to have acquired the copyright solely for the purpose of suppressing material, while here the plaintiffs were in fact the original authors of the leading textbook in child psychology and merely seek to defend the protection afforded to them by law. Significantly, the copyrighted material in Rosemont involved ten-year-old magazine articles which had not been distributed commer-

* Significantly, appellants chose to omit this vital conclusion - the "reasonableness standard" - from its lengthy quotation from Rosemont from their brief below, and from their brief on appeal as well, even though it was included in the opinion below.

cially after their initial publication, while here the plaintiffs' textbook, albeit its fourth edition, is subject to active competition from the infringing Meredith book.

The Rosemont standard of "reasonableness" applied to the extent of paraphrasing was earlier followed in Orgel v. Clark Boardman Co., 301 F.2d 119 (2d Cir.), cert. den., 371 U.S. 817, 83 S.Ct. 31, 9 L. Ed.2d 58 (1962). There, the Court rejected the fair use defense and found infringement based on a finding that one important section of a law treatise was "strikingly similar" to the copyrighted work and thus the defendant's book was merely a "colorable variation" of the infringed work.

"Appropriation of the fruits of another's labor and skill in order to publish a rival work without the expenditure of the time and effort required for independently arrived at results is copyright infringement." 301 F.2d at 120.

Although appellants assert that Orgel was distinguished by Rosemont based upon evidence of independent work and reliance on other sources, the distinctions drawn by Rosemont relate exclusively to the "lifting of

the essence" of the protected material, and the adoption of the prior author's analysis. The fact that some independent work was performed was not cited as the distinguishing factor; the determining factor was reasonableness, which did not permit extensive paraphrasing. Here, the "independent research" consisted largely of attempts to disguise the actual source, thus emphasizing the intent to conceal. Consolidated Music Pub. v. Hansen Publications, supra. See also Holdredge v. Knight Publishing Corp., 214 F.Supp. 921 (S.D. Cal. 1963), where three days' effort on an article was held to negate the possibility of independent effort when compared to eight or nine years' work on the copied books.

Furthermore, the facts at bar are far stronger than those in Orgel. For here, not one section but at least five chapters of the Meredith Book were outlined nearly in their entirety from Mussen.* In addition, more than half of one chapter was obviously paraphrased from Mussen. Finally, the evidence at bar shows that throughout the enterprise, Meredith deliberately and wilfully

* Only five of Meredith's outlines of Mussen have been produced by Prentice-Hall so that similar comparisons of other chapters cannot be made in that way. The extensive similarities in content coverage in other chapters lead Harper & Row and the Authors to believe that the same disreputable methods were used in at least several other chapters.

"appropriated the fruits of another's labor and skill in order to publish a rival work without the expenditure of the time and effort required for independently arrived at results", Orgel, supra.

Appellants' attempt to acquire fair use protection is also based upon their attempt to expand the definition of "fair use" found in Rosemont. Appellants emphasize the since Rosemont rejected the reasoning of the Seventh Circuit in Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950), no author is "absolutely precluded from saving time and effort by referring to and relying upon prior published material". (366 F.2d at 310). No absolute bar to time-saving was suggested either by appellees or by the Court below, and, in any event, the rejection of Toksvig must be read with the "reasonableness standard" of Rosemont, ignored by appellants.

Moreover, appellants cannot seriously suggest that the Court below overlooked the Rosemont reasoning in reaching its decision. While a limited quantity of time-saving appropriation might be eligible for fair use characterization (assuming that the usage and purpose were

non competitive), appellants have not begun to refute the conclusion that the quantity of the time-saving gained by appropriation was extensive and thus impermissible. Furthermore, appellants do not challenge the fact that the quantity of appropriations is but one of the standards to determine fair use eligibility. Here, they indisputably failed to satisfy the other standards - competitive effect and purpose of usage. In Rosemont, of course, the usage of the copyrighted matter was found non-competitive and, the acquisition of the copyright involved was found to be part of a plan to suppress information.

Other decisions also establish the unsoundness of appellees' contention. In Marvin Worth Productions v. Superior Films Corp., 319 F.Supp. 1269 (S.D.N.Y. 1970), the producer of a film biography of Lenny Bruce attempted to defend his appropriation of copyrighted biographical material by asserting the doctrine of fair use, and in fact, relied primarily, if not exclusively, upon Rosemont. In Marvin Worth, Judge Lasker concluded that the reliance upon Rosemont was misplaced, emphasizing the small quantity of material taken in Rosemont as well as the purpose of Howard Hughes to suppress the biography. The Court further

cited the fact that plaintiff's articles had been out of circulation for twelve years and, thus, could not have been injured. The opinion emphasized the concurring opinion of Judge Lumbard in Rosemont (in which Judge Hays also joined), which emphasized the fact that the copyright laws were not designed to restrict the dissemination of information, but

"It is the purpose of those laws to give reasonable protection to the product of an author and his manner of expression where the author's proper interest in the product may suffer thereby (emphasis in original)."
319 F.Supp. at 1276.

As Judge Owen properly concluded in the opinion below:

"It is hardly an inducement to someone like a Dr. Mussen to do the years of research and scholarship needed to produce an authoritative text, if an untrained, freelance speechwriter for an oil company may paraphrase major portions and make a competing text out of it." (JA 196a)

In McGraw-Hill v. Worth, supra, where the Court found no substantial similarity and did not need to reach the affirmative defense of fair use, it noted in a dictum that fair use was merely a colorable defense under Rosemont, quite probably because the allegedly infringing work served

no special purpose since both were textbooks addressed to same market. The Court had emphasized that the offensive portions of the allegedly infringing text consisted of only 1.7% of the allegedly infringing book. In Time, Incorporated v. Bernard Geis Associates, 239 F.Supp. 130 (S.D.N.Y. 1968), the District Court, in finding fair use, was influenced by the fact that the photographs copied constituted but a small fraction of a full length book about the assassination of President Kennedy published by the defendant, and the fact that the allegedly infringing book was not competitive with Life Magazine.

No evidence has been offered showing the Court below abused its discretion in concluding that the fair use doctrine was inapplicable.

A. The Diverse Nature of the Field of Child Development and Psychology in no way Restricts Scholar's Form of Expression

Appellants argue that Judge Owen failed to apply the law of copyright applicable to the "type" of work before the Court (App. Br., pp. 25-30). The thrust of appellants' argument is that Mussen and Meredith as college

textbooks should be viewed as analagous to short technical works, which are forced to contain basically the same material, such as the high school history cram books in Oxford Book Co. v. College Entrance Book Co., 98 F.2d 688 (2d Cir. 1938); the printed lecture on how to apply a hypodermic medication in Chautauqua School of Nursing v. National School of Nursing, 238 F. 151 (2d Cir. 1916); the radio transmission primer in Ricker v. General Electric Co., 162 F.2d 141 (2d Cir. 1947); as well as the economics textbooks in McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F.Supp. 415 (S.D.N.Y. 1971).

There is no dispute that if the material allegedly copied permits of an extremely limited manner of presentation, the Courts will allow a wider latitude in finding the usage fair, McGraw-Hill, supra. The threshold question, however, relates to the nature of the subject matter involved. The Court below explicitly found that the rationale of McGraw-Hill was not applicable:

"since the field of child psychology is characterized by a wide divergence among the texts in both the subjects selected and their organization and approach, unlike the field of economics in which there is a single predominant approach to the materials." (JA 187a)

Appellants' own market research report conclusively proves that no single text or approach dominates the child psychology field (JA 72-73a; 74-79a). The Vice-President and Publisher of the College Department of Harper & Row with years of marketing experience in college texts, confirmed appellants' market research findings:

"Many other child development texts compete for this large market, and to my knowledge, no single text, including MCK dominates this field... Nor so far as I know, is there a single predominant approach, philosophy or organization of the material in this field; indeed there is a wide divergence in the texts in the subjects selected, and their organization and approach" (JA 160a).

An analysis of the child psychology field and the leading texts is further detailed in paragraphs 3-6 of the Kagan Affidavit (JA 173-174a).

Significantly, appellants' brief fails to point to any support in the record which might controvert this finding (App. Br. p.13). Although appellants complain in their brief that the Court "ignored" certain evidence offered by appellants below, they refer only to the alleged independent research performed by Sutton-Smith

and Meredith,* as well as their various explanations for the voluminous similarities between Meredith and Mussen.

Finally, as Sutton-Smith himself has admitted; "There is nothing logical -- it (the textual material) has certain precedents and conventions, but there is nothing necessary. Different writers and different books divide up the organism [the subject matter] in all sorts of ways." (JA 315a). Thus, the court's finding of a wide divergence in the field of child psychology is supported by overwhelming evidence and is uncontroverted by any facts in this record.

The authorities offered by appellants are simply not applicable to a child psychology textbook designed for college sophomores and juniors. For example, in the very quotation from Chautauqua relied on by appellants (App. Br. p.26), the Court compared the lecture on the insertion of a hypodermic to "a directory or a dictionary or a guide for railroad trains or for automobile trips", which of their nature

* Much of the "independent research" consisted of nothing more than efforts to obtain examples and alternative authorities for matter contained in Mussen (See, e.g., JA 90a, 524a, 527a).

require extensive resemblances. Obviously, such materials must inevitably be composed of limited factual material set forth in a narrow framework or format, totally unlike a several hundred page scholarly textbook for a diverse and ever-changing field. Furthermore, Chautauqua held that even in such instances, a Court would have to determine "whether the writer has availed himself of the earlier writer's work without doing any independent work himself". Here, the Court below found that the authors of Mussen spent "upwards of 17,000 hours" in preparing Mussen, while the participation of Sutton-Smith was limited to a few hours a week for some six months (JA 93a). Thus, not only is Mussen unlike the pamphlet in Chautauqua, but the rationale of Chautauqua is inapplicable as well.

An examination of Oxford Book Co., supra, upon which appellants heavily rely, reveals obvious distinctions from the case at bar. There, the condensed cram books were designed merely to summarize highschool history courses and thus, of necessity, would have to contain principally the same set of chronological material for a given period. No one can seriously suggest that

these brief summaries are comparable to a college-level textbook in an ever-changing social science as diverse and rich as child psychology and development. Furthermore, in Oxford Book Co., the Court noted that the defendant's book had been written by experienced high school history teachers and "there was substantial evidence to the effect that the defendant-authors wrote from memory and from sources other than that book" (98 F.2d at 691). Here, however, the record establishes that the actual authors of Meredith were free lance writers with no credentials in the field of child psychology; the principal writer had not even completed a single psychology course. Furthermore, as the Court below found, each writer was required to complete a chapter within a period of weeks and the Meredith employees were directed to call to the editors' attention any material omissions or deviations from the Mussen text (JA 188-189a). Thus, Oxford Book is clearly inapposite.

Similarly, the Second Circuit in Kicker, supra, found that the plaintiffs' radio primer provided instructions principally in transmission, while the defendant's

instruction booklet was addressed principally to the servicing and maintenance of receivers. Furthermore, the plaintiff's materials drew heavily from FCC publications and obviously in a thirty-two page pamphlet were extremely limited in the facts that could be presented. Surely the Court below quite properly did not follow these authorities, which dealt principally with technical manuals designed to teach limited and uncontroversial factual material.

Where the courts have been confronted with materials which permit a broad divergence of expression, as in the case at bar, fewer takings are tolerated. Thus, in Higgins v. Baker, 309 F.Supp. 635 (S.D.N.Y. 1970), the Court found that materials allegedly infringing copyrighted materials published by a distinguished psychiatrist, the late Dr. Wilhelm Reich, Judge Tenney noted that excerpts from esoteric psychiatric writings were to be distinguished from materials which of their nature restricted expression, such as the primer in Ricker, as well as the contest rules in Morrissey v. Proctor & Gamble Co., 379 F.2d 675 (1st Cir. 1967). Cf. Chamberlin v. Uris

Sales Corp., 150 F.2d 512 (2d Cir. 1945), where rules for a backgammon game were in issue.

College economics, as described in McGraw-Hill, is also distinguishable from the multi-discipline, diverse field of child psychology and development. In that case, the Court found that the field of economics had been so dominated by what was termed the "Samuelson methodology" that any economics textbook was forced to organize its materials in a manner reflecting the influence of Professor Samuelson. In addition, economics had developed a large body of technical words and phrases and fixed concepts all of which had to be dealt with in any textbook, leaving an author a relatively narrow range of choices. As shown by the appellants' market research report (JA 67-79a), the Clark and Kagan affidavits (JA 160a; 173-174a) and Sutton-Smith's admission (JA 315a), in the child psychology and development field, there is no text or professor that has dominated the field so as to determine the form and structure of the presentation of materials. The field is filled with advocates of the widest range of points of view and no other textbook in the field of child psychology and development is similar

to Mussen, nor are they similar to each other, except for the Meredith book which adopts virtually in toto Mussen's structure, content and language. Obviously, the record amply supports the Court's finding that the McGraw-Hill rationale was inapplicable.

POINT III

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN ITS GRANT OF THE PRELIMINARY INJUNCTION

Appellants challenge three findings of the Court below with respect to the propriety of the preliminary injunction. First, they argue that given the large assets of Appellant, Prentice-Hall, monetary damages should suffice and there has been no detailed showing of irreparable harm. Appellants next challenge the existence of irreparable harm, given the fact that the fourth edition of Mussen, now on the market, is significantly different from the third edition, apparently infringed by Meredith. Lastly, appellants raise again the argument of laches as a bar to the preliminary injunction. As to each of these claims, appellants have totally failed to demonstrate that the Court below abused its discretion in reaching its conclusions.

A. The Showing of Irreparable Harm.

Appellants persist in challenging the clear rule in this circuit that detailed proof of irreparable harm is not a prerequisite for a preliminary injunction where a prima facie case of infringement has been

established. In Rushton v. Vitale, 218 F.2d 434 (2d Cir. 1955), the Second Circuit held:

"When a prima facie case for copyright infringement has been made...[the moving parties] are entitled to a preliminary injunction without a detailed showing of irreparable harm." 218 F.2d at 436.

This rule has been repeatedly followed. Uneeda Doll Co., Inc. v. Goldfarb Novelty Co., 373 F.2d 851 (2d Cir. 1967) cited by the Court below; Concord Fabrics, Inc. v. Marcus Bros., 296 F. Supp. 736 (S.D.N.Y. 1969).

In American Metropolitan Enterprises of N.Y. v. Warner Bros. Records, 389 F.2d 903 (2d Cir. 1968), the Second Circuit stated:

"A copyright holder in the ordinary case may be presumed to suffer irreparable harm when his right to the exclusive use of the copyrighted material is invaded." 389 F.2d at 905.

This ~~same~~ rule was later quoted and applied in Rice v. American Program Bureau, supra, 446 F.2d at 688.

As the Court noted in Marvin Worth Productions, supra, the argument here advanced that money damages will make the plaintiffs whole was an over-simplification since the measurement of plaintiffs damages will usually be complex, problematic and unscientific.

Notwithstanding the presumption afforded to a copyright owner by this rule (which appellants have not rebutted), the appellees have established that this year the May - August period constitutes by far the most important selling season of the year (JA 126a). Significantly, in McGraw-Hill v. Worth Publishers, Inc., supra, in denying the preliminary injunction, the Court relied heavily on the fact that the motion for an injunctive relief had been brought in September, after most of the textbooks had been sold for the ensuing school year, leaving the Court to conclude that an injunction was unnecessary:

"...by the time this motion was heard on September 20, 1971, the Fall semester had begun at most colleges, and the retail sales had already been made by the book-storesAn injunction would have done little besides cause widespread confusion Since this text is designed for year-long courses,... the next large sales surge will be in the Summer of 1972." (335 F. Supp. at 422).

In addition, other significant evidence of potential irreparable damage is before the Court -- damage to the appellees in sales and adoptions (and future sales by reason of those adoptions).^{*} Obviously the reputations

^{*}"In normal practice, once a text is adopted by a professor for his course, he continues its use for a number of years, being unwilling to revise the teaching notes for his course to dovetail with a different text." (JA 199a)

of the Authors and Harper & Row suffer from confusion as to which book is a true work of original scholarship, notwithstanding the differing copyright dates. College professors and students would be prejudiced by the issuance of an injunction in mid-summer when fulfillment of unfilled orders would be harmed but professors would be on vacation and unavailable to order a replacement book in time for all classes (JA 164a). Moreover, the Court below properly found that "Some child psychology students would be studying mere paraphrases of scholarship and not the original work of scholarship itself." (JA 195a-196a). Clearly, a strong showing of irreparable harm was made, and the Court below properly so found.

B. The Specious Argument Based on the Publication of Mussen's Fourth Edition.

As the Court below properly noted:

"It is argued by Meredith, et al, that no injunction is needed since the alleged plagiarism is of Mussen's third edition, and a revised fourth edition has just been published which is new in content and is selling well. This argument, however seriously proffered, is answered by the question: Why should Mussen's fourth edition have to suffer any competition from a substantially plagiarised version of the third edition?" (JA 198a)

It is respectfully submitted that an ample showing of irreparable harm to the copyright owners of both the third and fourth editions of Mussen has been amply set forth in the record, even if a detailed showing were necessary and, as shown above, no such showing is required in this circuit. To accept appellant's illogical argument would, in effect, impose an involuntary waiver of copyright protection of earlier works by all copyright owners who publish a substantially revised edition of a scholarly work.

C. The Absence of Laches.

Appellants have not challenged any of the findings which led the Court below to conclude that the appellants were not unduly dilatory in asserting their rights. The history of the appellees' vigorous and persistent effort to protect their copyrights is set forth in detail in the Opinion below at pages JA 196-198a. In appellants' brief, none of those facts are disputed. Instead, appellants offer the unsupported statement that the mere passage of time since discovery of the infringement alone defeats a motion for a preliminary injunction (App. Brief, pp. 38-39). The very authorities relied on, however, refute this contention.

In Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc., 335 F. Supp. 278 (S.D.N.Y. 1971), the Court found the existence of laches only where the delay was inordinate and unexplained. There, the plaintiffs took no action of any kind for over seven months, and did not even reply to defendant's request for particulars relating to the claimed infringement. Similarly, in Klauber Brothers v. Lady Marlene Brassiere Corp., 285 F. Supp. 806 (S.D.N.Y. 1968) the plaintiff provided no explanation for the delay of over a year from its first claim letter until the commencement of its suit. In Irving J. Dorfman v. Borlan Industries, Inc., 309 F. Supp. 21 (S.D.N.Y. 1969), the Court found that the plaintiff had in fact acquiesced in the repeated postponements of the preliminary injunction here. There is no support in the record for the finding of acquiescence nor of unexplained delay and, in fact, appellants have not even suggested that there is support for such findings.

In any event, before laches could operate to bar appellees, appellants must show a prejudicial change of their position taken in reliance on the passage of time. Obviously, appellants have made no such showing.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed in every respect.

Respectfully submitted,

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U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

MEREDITH CORP.,

Plaintiff-Appellant,

against

HARPER & ROW, et al,

Defendants-Appellees.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, James Steele,
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York
That on the 20th day of June 19 74 at *

deponent served the annexed Appellees' Brief

upon

*

the in this action by delivering ^{is} a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 20th
day of June 19 74

James Steele
Print name beneath signature

JAMES STEELE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

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U.S. COURT OF APPEALS:SECOND CIRCUIT

MEREDITH CORP.,
Plaintiff-Appellant,
against

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Defendants-Appellees.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK

SS.:

I, Laurel N. Huggins,

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1050 Carroll Place, Bronx, New York

That upon the 20th day of June 1974, deponent served the annexed

Appellees' Brief upon Molinare, Allegretti, Newitt & Witdoff attorney(s) for

Plaintiff-Appellant in this action, at 12 135 South La Salle St., Chicago, Ill. 60603

the address designated by said attorney(s) for that
purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a
Post Office Official Depository under the exclusive care and custody of the United States Post Of-
fice Department, within the State of New York.

Sworn to before me, this 20th
day of June 19 74

Laurel N. Huggins
Print name beneath signature

LAUREL N. HUGGINS

Robert T. Brin
ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975